(13)

No. 164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

HOLLAND FURNACE COMPANY, a corporation,
Petitioner,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, as and constituting the Board of the Department of Treasury of the State of Indiana,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CITATIONS

Cases:

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HOLLAND FURNACE COMPANY, a corporation, *Petitioner,* v. DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, HENRY F. SCHRICKER, JAMES GIVENS, AND RICHARD I. JAMES, as and constituting the Board of the Department of Treasury of the State of Indiana, *Respondents.*	No. ————

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Holland Furnace Company prays that a writ of certiorari be issued to review the judgment herein of the United States Circuit Court of Appeals for the Seventh Circuit and respectfully shows to this Honorable Court:

Opinion Below

The opinion of the lower court (R., 48-53) is reported in 133 F. 2d 212.

Jurisdiction

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's judgment for respondents on January 30, 1943 (R., 54). Petitioner filed a timely petition for rehearing (R., 54-61) which was denied on February 17, 1943 (R., 63). A motion by petitioner to recall the mandate and reconsider the decision was denied on June 2, 1943 (R., 71). An order extending the time for filing a petition for certiorari to and including July 16, 1943, was signed by Mr. Justice Murphy on May 3, 1943 (R., 74). This court has jurisdiction under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347(a).

Questions Presented

1. Whether petitioner's receipts from its customers in Indiana were from interstate commerce, and whether the imposition of the Indiana gross income tax upon such receipts violated the commerce clause, Article I, Section 8, of the Constitution of the United States.

2. Whether a substantial part of such receipts was from sources outside Indiana, and if so, whether all or such part of such receipts was not subject to said tax because of the terms of the Act as construed by the Supreme Court of Indiana, and because of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether petitioner's receipts prior to April 1, 1937, the effective date of the 1937 amendment of the taxing act, were in any event taxable at the rate of 1%, or whether such receipts were taxable only at the rate of ¼ of 1% as being from "manufacturing, compounding or preparing for sale, profit or use * substances * or commodities."

Statement

This action was brought to recover taxes collected by respondents under the Indiana Gross Income Tax Act both as originally enacted in 1933 (Chap. 50, Indiana Acts 1933, Sec. 64-2601, et seq., Burns Ind. Stats. 1933) and as amended in 1937 (Chap. 117, Indiana Acts 1937, Sec. 64-2601, et seq., Burns Ind. Stats. 1933, Pocket Supp.). From an adverse judgment in the District Court (R., 31) petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, with the result above stated.

During 1935 to 1939, inclusive, the periods involved herein, petitioner, a Michigan corporation, manufactured at Holland, Michigan, furnaces and heating appliances. It was qualified to do business in Indiana where it maintained sales offices at various cities from which its agents solicited written orders from prospective Indiana customers. Each order provided that petitioner would furnish and install at the customer's premises a particular heating system for a stipulated amount payable at petitioner's office in Holland, Michigan, and contained numerous other provisions in which the petitioner was referred to as the "seller" and the customer as the "buyer." (R., 22-25.)

After such an order signed by a prospective Indiana customer had been accepted by petitioner at its Holland,

Michigan, office (the Indiana agents had no authority to accept), petitioner shipped the furnace specified in the contract from Holland, Michigan, to the structure of the customer in Indiana and there installed it. Petitioner paid the transportation charges. The furnaces and equipment were not custom made and could have been installed by any person experienced and qualified in that line of work, but all the installations were made by workmen trained in petitioner's factory. (R., 26-28.)

Petitioner offered to apportion the tax upon the basis of receipts from activities within and without Indiana, but respondents refused to apportion on any basis. (R., 28-30.)

The following schedule is an analysis of petitioner's receipts from its Indiana customers, broken down under various heads therein described, according to the percentage of each such item:

Equipment	50 %
Installation expense	20 %
Sales and administrative expense	17 %
Credit reports	½%
Transportation	4½%
Margin for profit and miscellaneous	8 %
	100 %

(R., 30.)

Specification of Errors

1. The Circuit Court of Appeals for the Seventh Circuit erred in affirming the judgment of the District Court in favor of respondents.

2. The Circuit Court of Appeals for the Seventh Circuit erred in denying petitioner's motion to recall the mandate

and reconsider the decision, as the Supreme Court of Indiana had rendered a decision in the interim contrary thereto.

Reasons for Granting the Writ

1. The decision below conflicts with *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. Ed. 1365, wherein it was held that the tax involved violates the commerce clause of Article I, Section 8 of the Constitution of the United States "as applied to receipts from interstate sales" because "the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce;" and because "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured."

Petitioner's installation of the furnaces, representing but 20% of the price, was only an incident of interstate sales by a non-resident of Indiana to Indiana customers.[1]

Allied Mills, Inc .,v. Department of Treasury (No. 669, this term), 87 L. Ed. 514 (advance sheet) is not controlling as there the taxpayer was a resident of Indiana, had factories in Indiana, and the question, as stated by the Indiana Supreme Court, 42 N. E. 2d 34, 35 (advance sheet) was whether "the incidental interstate nature" of the taxpayer's business entitled it to exemption. Here petitioner had no factory in Indiana and its business was inescapably, not incidentally, interstate in character.

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[1] *York Mfg. Co. v. Colley*, 247 U. S. 21, 22-26, 62 L. Ed. 963, 964-966; *Willson v. Riddle* (Conn.), 20 Atl. 2d 402; *Barnett v. Kennedy* (Ill. App.), 42 N. E. 2d 298; *Bennett v. Piscitello*, 9 N. Y. S. 2d 69; *Fifteenth Street Investment Co. v. People* (Colo.), 81 P. 2d 764; *Hess Warming & Ventilating Co. v. Burlington Grain Elevator Co.* (Mo.), 217 S. W. 493; *Filter Mfg. Co. v. Evans*, 86 Ind. App. 144, 154 N. E. 677; *S. F. Bowser & Co. v. Savidusky* (Wis.), 142 N. W. 182; *Brandtjen & Kluge v. Nanson* (Wash.), 115 P. 2d 731.

In considering the validity of a particular tax measured by gross receipts, this court has been concerned heretofore principally with the nature of the tax and the nature of the activities involved. If the tax is conditioned on a local activity and hence cannot be repeated in other states, its incidental effect upon interstate commerce does not make it invalid. Such was the tax in *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, and that in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565. In form the tax in *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. Ed. 272, was also conditioned on a local event but in substance it included in its measure substantial activities occurring outside the State of Washington, and hence it failed in its entirety. The nature of the Indiana tax was adjudicated in the Adams Mfg. Co. case, *supra*. As to the nature of the activities, if they are wholly intrastate, the commerce clause does not prevent imposition of the tax regardless of its character. Thus in *Department of Treasury v. Wood Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188, the tax here involved was upheld as applied to receipts by a non-resident from intrastate activities—buying and selling of ties in Indiana. Here, petitioner's receipts were from interstate activities—manufacture of furnaces in Michigan and sale thereof to Indiana customers.

2. The decision below conflicts with the subsequent decision of the Indiana Supreme Court in *Department of Treasury v. International Harvester Co.*, 47 N. E. 2d 150 (advance sheet) and hence with the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 69, 82 L. Ed. 1188. It was held in the International Harvester case that receipts by a non-resident from goods manufactured outside Indiana and sold to In-

diana customers pursuant to conditional sales orders solicited in and accepted outside Indiana were not from Indiana sources. The source of a non-resident's receipts is a vital inquiry inasmuch as the taxing act and administrative regulations do not purport to reach receipts of non-residents other than receipts from sources within the state.[2]

Respondents' contention in the International Harvester case that the Class A receipts were not from Indiana sources because the activity which gave rise to the receipts was the solicitation and delivery of the merchandise to customers in Indiana, the company maintained in Indiana numerous business establishments also engaged in business in Indiana, and the transactions were consummated by delivery of the goods sold to the Indiana customers in Indiana, was rejected by the Indiana Supreme Court. That decision is in

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[2] Section 2 of the original act (Chap. 50, Acts of 1933; Sec. 64-2602 Burns' Ind. Stat. 1933) provided:

"There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income *derived from sources within the State of Indiana*, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities." (Emphasis ours.)

The substance of section 2 with respect to non-residents was not changed by the 1937 amendment. Chap. 117, Acts of 1937, Sec. 2; Sec. 64-2602, Burns' Ind. Stat. 1933, Pocket Supplement, provides that the tax "shall be levied upon the receipts of the entire gross income of all persons resident and/or domiciled in the State of Indiana * * * and upon the receipt of gross income derived from activities or businesses or any other source within the State of Indiana of all persons who are not residents of the State of Indiana."

The scope of the statute as embracing a non-resident's receipts from sources in Indiana is reflected in Regulation 3600, wherein it is stated that non-residents "will be liable for making return of and payment of tax upon all gross receipts derived *from Indiana sources* in excess of $1,000 in any calendar year" and in Regulation 3603, which provides that "the rule as expressed in Reg. 3600 * * * shall be enforced as to all non-residents deriving income from *sources* * * * *within the State of Indiana*." (Emphasis ours.)

accord with *Compania General, etc. v. Collector of Internal Revenue*, 279 U. S. 306, 73 L. Ed. 704.

Even under the unsound view of the Circuit Court of Appeals in the instant case that because of petitioner's installation of the furnaces petitioner's contracts with its Indiana customers were not for sales of goods but were "local" contracts, Michigan clearly was the source of that part of petitioner's receipts represented by activities occurring therein. An analysis of petitioner's receipts was stipulated by the parties, found by the Master, adopted by the District Court and is above set forth. The concept of source as the activities which produce or result in the income is directly applicable.[4]

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[4] In *Trane Co. v. Wisconsin Tax Commission* (Wis.), 292 N. W. 897, 901-902, the court quoted at length from its opinion in *United States Glue Co. v. Oak Creek* (Wis.), 153 N. W. 241 (affirmed in 247 U. S. 321, 62 L. Ed. 1135). In the latter case it was said (153 N. W. 244):

"The statute seeks to tax the part of this income which has its source in this state. * * * The manufacture, the management, and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory, and constitute the source out of which the income issues," etc.

In *Jackling v. State Tax Commission* (N. M.), 58 P. 2d 1167, the taxpayer performed services within and without the taxing state. An income tax act was held inapplicable to receipts for services performed outside the state, as such receipts therefore were not from sources within the state.

In *Re Kansas City Star Co.* (Mo.), 142 S. W. 2d 1029, 130 A. L. R. 1168, the tax was imposed on the net income of residents and non-residents from all sources within the State of Missouri. The court recognized that the source of income was determined by the nature and location of its producing cause; that it is not merely the place where the income is captured by delivery of the finished product and collection of the proceeds, but the source is the place where the income is earned or produced—if by labor, the place where the labor is performed, and if by capital, the place where the capital is employed. This principle is recognized also in *Maxwell v. Kent-Coffey Mfg. Co.* (N. C.), 168 S. E. 397, 90 A. L. R. 476, wherein the court said (90 A. L. R. at 480):

"The bare fact of sale produces no income. It is merely the act by which the income is captured; the capital, the organization, or efforts which produce the sale, are the things to be considered in ascertaining the amount of income to be credited to the sale."

Otherwise the taxing act, as applied here, violates the due process clause of the Fourteenth Amendment.[5]

3. If petitioner's receipts were not from sales of goods, the decision of the Circuit Court of Appeals conflicts with the decision of the Indiana Supreme Court in *Oster v. Department of Treasury*, 219 Ind. 315, 37 N. E. 2d 528.

Sec. 3(a) of the original act (Chap. 50, Acts of 1933; Sec. 64-2603, Burns' Ind. Stat. 1933) imposed a tax at the rate of ¼ of 1% upon receipts from the "business of manufacturing, compounding, or preparing for sale, profit, or use, any article or articles, substance or substances, commodity or commodities." Respondents have contended heretofore, and the Circuit Court of Appeals has decided, that petitioner's entire receipts were from the performance of construction contracts in Indiana and were taxable at the 1% rate prescribed by Sec. 3(f) of the 1933 Act upon receipts from the performance of contracts.

In the *Oster* case, the Indiana Supreme Court reversed the lower court's judgment, which had been affirmed by the Indiana Appellate Court (33 N. E 2d 799), and rejected the Department of Treasury's contention that performance of a contract not resulting in a sale of goods was subject to the 1% tax rate imposed by Sec. 3(f) of the 1933 Act upon receipts from personal services and the performance of contracts. The taxpayer was engaged in manufacturing, one of the activities mentioned in Sec. 3(a), but there were no sales of goods. Hence if there were no sales of goods in

[5] *Hans Rees' Sons v. North Carolina*, 283 U. S. 123, 75 L. Ed. 879; *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673; *Butler Brothers v. McColgan*, 315 U. S. 501, 86 L. Ed. 991.

the instant case, the lower rate applies even though contracts were performed, as petitioner was engaged in manufacturing.

Petitioner submits that the writ should be granted.

Respectfully submitted,

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